

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42123

M&G POLYMERS USA, LLC

v.

CSX TRANSPORTATION, INC.

Decided: August 23, 2012

This decision holds in abeyance the motion to compel discovery filed on August 2, 2012, by M&G Polymers USA, LLC (M&G).

BACKGROUND

On June 18, 2010, M&G filed a complaint challenging the reasonableness of various common carrier rail transportation rates established by CSX Transportation, Inc. (CSXT) for the transportation of polyethylene terephthalate (PET)¹ in carload traffic.² M&G alleges that CSXT possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed pursuant to the Board's Stand-Alone Cost (SAC) test. On August 4, 2010, the Board served a decision establishing a procedural schedule and a protective order. Following that decision, M&G amended its complaints three times. The third amended complaint was filed January 31, 2011 (with a correction filed on February 1, 2011). On January 11, 2011, M&G filed a motion requesting that the Board modify and extend the procedural schedule, which the Board granted in a decision served on February 24, 2011.

On January 27, 2011, CSXT filed a motion for expedited determination of jurisdiction over the challenged rates (motion to bifurcate), arguing that many of the challenged rates are subject to effective competition from truck and/or rail-truck transportation alternatives and, therefore, not subject to the Board's rate reasonableness jurisdiction. On February 18, 2011, M&G replied in opposition to the motion to bifurcate. However, on April 15, 2011, M&G

¹ PET is a plastic pellet substance that is widely used in many consumer and industrial applications such as plastic bottles, food packaging, and carpet fiber.

² CSXT provides transportation in single-line service for 18 of the 42 rates currently at issue. With regard to the other 24 rates, CSXT operates in joint-line service with one or more other railroads.

withdrew its opposition to the motion to bifurcate and filed another motion to modify the procedural schedule, to which CSXT replied on April 19, 2011.

In M&G Polymers USA, LLC v. CSX Transportation, Inc. (Bifurcation Decision), NOR 42123 (STB served May 6, 2011), the Board bifurcated this proceeding into separate market dominance and rate reasonableness phases, holding the rate reasonableness portion of the proceeding in abeyance and postponing the submission and consideration of rate reasonableness evidence, if necessary, until after the Board has made a determination regarding the issue of market dominance. The Bifurcation Decision also established a new procedural schedule to govern the proceeding's market dominance phase. Submission of market dominance evidence was completed on August 4, 2011, when M&G filed its Rebuttal Evidence. On September 30, 2011, CSXT filed a motion to strike certain portions of M&G's Rebuttal Evidence, to which M&G replied on October 14, 2011.³

M&G filed the instant motion to compel discovery on August 2, 2012. Because the motion seeks discovery relating only to rate reasonableness, a phase of this proceeding held in abeyance pursuant to the Bifurcation Decision, M&G's motion to compel will be held in abeyance pending further order of the Board.

DISCUSSION AND CONCLUSIONS

M&G contends that under 49 C.F.R. §§ 1114.31(a) and 1114.29, CSXT should update the discovery evidence related to the rate reasonableness portion of the proceeding. M&G asserts that an update is necessary given the time that has passed since the close of discovery, that waiting to update until after the Board issues a market dominance decision would cause unnecessary delay in the proceeding, and that the burden for CSXT would be minimal. M&G further claims that the Board should balance the burden to M&G of delaying the proceeding against the minimal burden imposed upon CSXT by requiring an update of its discovery responses now rather than after the Board issues a decision on market dominance.⁴

Citing the Board's Bifurcation Decision statement that "[t]he rate reasonableness phase of this proceeding, including all motions related to rate reasonableness, is held in abeyance

³ CSXT's motion to strike, as well as M&G's motion requesting permission to late file its Opening Evidence (filed June 7, 2011), will be addressed in a separate decision.

⁴ M&G correctly notes that because CSXT has not raised a market dominance-related jurisdictional challenge to certain rates, at least some portion of this case likely will proceed to the rate reasonableness phase. At the same time, M&G concedes that the geographic scope of the anticipated SAC analysis could be reduced by more than an insignificant amount depending on how the Board resolves the market dominance issue.

pending further order of the Board,” slip op. at 5, CSXT claims that the Board should deny the motion to compel because the requested discovery relates to rate reasonableness and therefore falls under the current abeyance. CSXT also argues that §§ 1114.31(a) and 1114.29 do not authorize the discovery sought by M&G, and that M&G waived any argument that additional discovery should take place by failing to raise the issue previously. Finally, CSXT raises multiple objections to the discovery that M&G requests, including that it is irrelevant, duplicative, and/or overly broad and burdensome, and that M&G has failed to meet its burden of demonstrating that it is entitled to the additional discovery.

As the passage from the Bifurcation Decision quoted above states, the rate reasonableness portion of this proceeding, including all motions related to rate reasonableness, is in abeyance. There is no dispute here that the discovery sought by M&G’s motion relates to the rate reasonableness portion of this proceeding. Thus, this motion will be held in abeyance pending further order of the Board.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. M&G’s motion to compel discovery filed on August 2, 2012, is held in abeyance pending further order of the Board.
2. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.